Nos. 11-338, 11-347

In The
Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN FOREST RESOURCE COUNCIL, PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, MONTANA WOOD PRODUCTS ASSOCIATION INC., ARKANSAS FORESTRY ASSOCIATION, FEDERAL FOREST RESOURCE COALITION INC., MINNESOTA FOREST INDUSTRIES, INC., AND INTERMOUNTAIN FOREST ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae represent companies and families that depend, in part, on federal forests and rangeland for their livelihood. *Amici* are concerned about access across federal forest roads to transport logs and cattle, to maintain vested water rights, for ingress to and egress from their private property, to promptly control insect and disease outbreaks, and to battle wildfire.

American Forest Resource Council (AFRC) is an Oregon nonprofit corporation that represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC represents over 50 forest products businesses and forest landowners. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions regarding access to, and management of, forest lands.

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[1] All the petitioners and respondent have filed a letter of blanket consent to filing *amicus* briefs and letters are lodged with the Clerk. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

In states where AFRC members are located, they purchase the majority of timber from federal lands managed by the U.S. Department of Agriculture, Forest Service and U.S. Department of Interior, Bureau of Land Management (BLM). AFRC members also enter into long-term stewardship contracts on the federal lands that include forest restoration projects such as repairing roads and replacing culverts. AFRC members also own land adjoining federal land that can only be accessed by crossing roads on federal land subject to permits, easements, and right-of-way agreements.

The Public Lands Council (PLC), headquartered in Washington, D.C., represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC is a Colorado nonprofit corporation. PLC membership consists of state and national cattle, sheep, and grasslands associations. PLC works to maintain a stable business environment for public land ranchers in the West where roughly half the land is federally owned and many operations have, for generations, depended on public lands for forage.

PLC members hold long-standing permits to graze on federal allotments. Many of them also own water rights, the claim to which depends upon those ranchers' continued beneficial use of the water, primarily through livestock grazing. PLC members develop and maintain water sources and other improvements on their allotments and use roads across federal land to manage vested water rights. Such access roads to

grazing allotments often are the same roads used to remove logs from federal land. PLC ranching families also own millions of acres of range and forest land, some of which is intermingled with federal land and, like AFRC members' properties, can only be reached by roads crossing federal land. The use of roads on federal land is critical to PLC's ability to continue properly managing natural resources and producing food and fiber for the nation and world. The loss of the exempt status of these roads would burden ranchers with new permitting costs, and incite litigation against the land management agencies, taking time and resources away from the already-belabored grazing permitting process. Thus, not only will PLC members' access be threatened; the renewal of their permits could be in jeopardy, as well.

The National Cattlemen's Beef Association (NCBA) is the national trade association representing the entire cattle industry. NCBA is a Colorado nonprofit corporation. NCBA represents nearly 139,000 cattle producers and 45 affiliated state associations throughout the United States. NCBA works to advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests. NCBA members are proud of their tradition as stewards and conservators of America's land and waters, and good neighbors to their communities. Many of NCBA's western members own water rights, hold federal grazing permits or own range and forest land intermingled with federal land. NCBA members

use the same public roads to move cattle between their private property and federal allotments that are used to remove logs. Without reliable and prompt access, NCBA members' ability to retain their water rights, protect the resource and stay in business is jeopardized. Adding another layer of permitting and increasing the opportunity for environmental litigation will also cause hardship for federal lands ranchers.

The Montana Wood Products Association, Inc. (MWPA) is a Montana nonprofit corporation promoting healthy forests and healthy communities through management of Montana's forests. MWPA's membership includes companies and individuals involved in all facets of Montana's wood products industry. They produce value-added products through manufacturing and provide over 7,500 direct jobs for Montana families. Since about 60 percent of Montana's forest land base is owned by the federal government, much of which is intermingled with MWPA members' private timberland, road access to and through these lands is vital to maintaining healthy forests, producing timber, and protecting lands from wildfire.

The Arkansas Forestry Association (AFA) is an advocate for the sustainable use and sound stewardship of Arkansas's forest resources to benefit AFA members and all Arkansans, today and in the future. AFA is an Arkansas nonprofit corporation. AFA members manage private forestland to produce essential forest products, while maintaining fresh water and air supplies, and enhancing fish and wildlife habitat.

AFA represents one of the state's largest manufacturing sectors which directly employs about 33,000 people with a $1.46 billion annually in payroll. National forests are an important timber source for AFA members in western Arkansas and AFA supports continued access to these forests. AFA has a long-standing interest in ensuring that the use of forest roads on federal land is subject to best management practices and not NPDES permits. AFA was an intervenor in a case on the Ozark National Forest where the Eighth Circuit ruled that logging and road building was covered by EPA's silvicultural exemption from NPDES permits. *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998).

The Federal Forest Resource Coalition, Inc. (FFRC) is a national coalition consisting of small and large companies and regional trade associations throughout the country whose members manufacture wood products, paper, and renewable energy from federal timber resources. FFRC is a District of Columbia nonprofit corporation. Coalition members employ over 350,000 workers in over 650 mills, with payroll in excess of $19 billion. FFRC wants to ensure timely and effective access to federal lands to sustainably produce timber, pulpwood, and biomass and for prompt management to protect federal forests from insects, disease, and wildfire.

Minnesota Forest Industries, Inc. (MFI) represents forest products producers and landowners that are committed to conservation, quality forest management, and industry development that fosters sound

environmental stewardship, multiple use of timberlands, and a dependable long-term timber supply. MFI is a Minnesota nonprofit corporation. Many of MFI's members purchase sawtimber and pulpwood from the Superior and Chippewa National Forests. MFI's members depend on timely access to these forests to complete timber sale contracts, particularly since access is limited during certain seasons. Disruption of access because of a time consuming NPDES permit process would diminish an important supply of federal timber to MFI's members.

Intermountain Forest Association (IFA), a Wyoming nonprofit corporation, develops and implements solution-oriented policies intended to provide a positive climate for forest management as well as a stable and sustainable supply of timber from public forestlands. IFA also works to assure that regulations affecting its members remain reasonable. IFA has members in Wyoming, Colorado, Montana, and South Dakota. IFA has a firm commitment to environmental responsibility and accountability, advancements in manufacturing technology and forestry science, and the business principles that have helped forest products businesses survive and prosper in the Intermountain West for a century. IFA members rely on national forest timber sales for an important part of their timber supply and have an interest in continued and ready access to the national forests.

PLC and NCBA (grazing *amici*) are deeply concerned with the prospect of having access to their members' grazing allotments prohibited or restricted

because of a requirement for NPDES permits. Grazing *amici* are also concerned about access delays and restrictions impeding the development and maintenance of water improvements many of which support vested water rights. AFRC, MWPA, AFA, FFRC, MFI, and IFA (timber *amici*) interests in obtaining timber from federal lands to run their mills would be harmed by an expensive and lengthy permit process imposed on federal agencies to obtain NPDES permits. All *amici* have an interest in continued access to their members' private land using roads that cross intermingled federal land and the prospect of new avenues for environmental litigation against federal agencies further threatens *amici's* members' livelihoods.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals failed to give deference to the Environmental Protection Agency's (EPA) long-standing interpretation that forest road construction, use, and maintenance from which natural runoff occurs does not require an NPDES permit under section 402 of the Clean Water Act, 33 U.S.C. § 1342.

Rather than repeat petitioner's legal arguments, *amici* want to emphasize the exceptional importance of the Ninth Circuit's decision to the management of the vast acreage of federal forest and rangeland which supply timber and forage for thousands of families and businesses in rural communities. *Leo Sheep*

Co. v. United States, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land in the Western United States, we granted certiorari"); *Andrus v. Utah*, 446 U.S. 500, 506 (1980). The effect of the Ninth Circuit decision extends beyond non-federal lands and logging activity which are at issue in this case. The decision also applies to millions of acres of federal land and to the roads used to access timber sales on national forests and public lands managed by the BLM. The decision also affects ranchers who use roads on federal land to access their federal grazing allotments and to maintain water rights, and to intermingled private and state landowners whose lands can only be accessed by roads across federal land.[2] Finally, neither the Ninth Circuit nor EPA has defined what in fact constitutes a "logging road" or a "forest road." Many roads on public lands are used for forest management activities beyond logging, including critical access for fighting wildfires, for recreation, and for other multiple use activities. Access for these purposes would all be impacted by an NPDES permit requirement.

Amici agree with EPA's long-standing interpretation that logging which occurs over several months on a site on 20 to 40 year intervals is not an industrial activity and that natural runoff is best controlled by non-point source best management practices. 55 Fed.

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[2] States owning land intermingled with federal land will be similarly affected.

Reg. 47,990, 48,011 (Nov. 16, 1990). Logging on tracts of public land is even less frequent, often separated by intervals of 50 years or more. Nor is grazing an industrial activity when it occurs on a federal allotment where a pasture may be grazed for only a few weeks out of the year and the road used twice annually to bring livestock to and from federal pastures. Moreover, on millions of acres of federal land, the same road accesses both federal forest and pasture and an injunction or regulatory restrictions on hauling logs will harm ranchers who need to use the same roads to haul livestock.

ARGUMENT

The Ninth Circuit decision will broadly limit the federal land management agencies' ability to continue to sell timber, issue grazing permits, manage and authorize fencing and water source improvements, contract for road construction and restoration projects, and provide timely access to intermingled private lands that can only be reached across federal land.

A. Resource Management of a Vast Area of Federal Forest and Rangeland is Likely to be Disrupted by the Erroneous Ninth Circuit Decision.

It is unclear whether the federal land management agency and the intermingled private landowners or

timber purchasers, grazing permittees, and road contractors would be obligated to obtain NPDES permits and conduct the required water runoff monitoring or whether this would be the responsibility of the federal land management agency. Regardless of who is responsible for obtaining the permit and conducting the monitoring, it would be an extremely costly, time-consuming, and daunting task. Nationwide, the Forest Service has approximately 378,000 miles of roads under its jurisdiction, covering 193 million acres. U.S. FOREST SERVICE, IMPLICATIONS OF DECISION IN *NEDC V. BROWN* TO SILVICULTURAL ACTIVITIES ON NATIONAL FOREST SYSTEM LAND, Doc. 1570-1, at 3 (Sept. 7, 2010). *Amici* App. 1a. The Forest Service estimates that if it must obtain permits for roads under its control, it would have to obtain over 400,000 permits. The agency estimates it could take more than 10 years to complete the permitting process. *Id.* at 5a. Even if the Forest Service can obtain programmatic permits by state, it estimates it would still take several years to obtain the necessary programmatic permits. *Id.*

The NPDES permit requirements and associated litigation will significantly impede the ability of the Forest Service and BLM to manage federal forests and rangeland, sell timber, issue grazing permits, repair roads, and restore forests and range to reduce the risk of wildfires. Wildfires on unhealthy federal forests and rangeland have burned onto *amici's* members' private lands damaging forest and range resources including wildlife habitat and water quality. An onerous permitting process to keep roads open

and maintained will increase the incentive for federal agencies to expand the obliteration and closure of roads and will discourage road maintenance. This will exacerbate the problem of federal, local, and private firefighters being hindered by inadequate access in an initial attack of wildfires during the critical first 24 hours after a fire starts and mean fewer roads to use as a fuel break to control a fire. Thousands of acres have burned unnecessarily because of limited access.

Both the Forest Service and BLM have a large backlog of fish passage restoration work to replace road culverts that are blocked, poorly sized, or too far elevated above the stream. U.S. General Accounting Office, GAO-02-136, RESTORING FISH PASSAGE THROUGH CULVERTS ON FOREST SERVICE AND BLM LANDS IN OREGON AND WASHINGTON COULD TAKE DECADES (2001). An NPDES permit requirement for installation of replacement culverts will stall this fish habitat improvement work even further. Formal administrative protests have been filed to halt use of roads for projects involving log hauling and road rehabilitation work on BLM lands on the grounds that the projects need a Clean Water Act discharge permit. *See Administrative Protest of Evans Creek Project Decision Record and Finding of No Significant Impact as Implemented via the Skeleton Mountain Timber Sale*, Klamath Siskiyou Wildlands Center, http://www.blm.gov/or/districts/medford/plans/evans/files/KSWildSkeletonProtest.pdf at 20.

Amici's concern that a vast acreage of federal lands will be drawn into this controversy is supported by actions of environmental groups. Before Congress temporarily directed that the Administrator of the EPA not require NPDES permits for discharge of stormwater runoff from forest roads (section 429 of the Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 429, 125 Stat. 786, 1046-47 (Dec. 23, 2011)), environmental groups threatened to stop the use of roads on federal land based on the Ninth Circuit decision. Three days after the Ninth Circuit filed its original opinion, the Alliance for the Wild Rockies and the Selkirk Conservation Alliance filed a 60-day notice of intent to sue for violation of the Clean Water Act challenging the Lakeview-Reeder Fuels Reduction Project. App. 10a. The project involves road maintenance, road construction, and road storage and decommissioning to achieve long-term sediment reduction and watershed improvement on the Idaho Panhandle National Forest in Idaho. A complaint challenging the project was filed on October 6, 2010. *Alliance for the Wild Rockies v. McNair*, No. 2-CV-00504-EJL (D. Idaho). The Forest Service subsequently withdrew the project and it was over a year and a half before supplemental analysis was complete.

Two projects in California were also challenged on the grounds that the Forest Service has not obtained an NPDES permit for the silviculture, road use, and road restoration included in these projects. The first project is the Angora project in the Lake

Tahoe Basin Management Unit that was prepared in response to the Angora fire within the Wildland Urban Interface (WUI) Defense Zone, which destroyed or damaged more than 250 structures on the South Shore of Lake Tahoe. *Environmental Assessment, Angora Fire Restoration Project,* USDA FOREST SERVICE (July 2010), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5181776.pdf. The Angora project includes removal of dead and dying trees, relocating roads outside of streamside zones, replacement of undersized culverts, and construction, decommissioning, and restoration of roads. *Id.* The second project is the Klamath National Forest travel management plan that will prohibit off-highway vehicle travel in some areas and permit off-highway vehicle travel on other roads. *Final Environmental Impact Statement; Motorized Travel Management Plan (formerly Motorized Route Designation), Klamath National Forest California and Oregon,* USDA FOREST SERVICE (January 2010), http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5120060.pdf. Off-highway vehicles and federal roads are used by ranchers to administer their federal grazing allotments, move livestock between pastures, and maintain fences and water sources. The administrative appeal argued that the Forest Service must obtain an NPDES permit which will delay much needed road restoration, culvert replacement, and forest health projects that lead to improved water quality.

The EPA has announced its intent to revise stormwater regulations to specify that NPDES permits are

not required for stormwater discharges from logging roads under Phase I of the stormwater program. 77 Fed. Reg. 30,473 (May 23, 2012). EPA also announced in the notice that it will consider adoption of remedial regulations with forest roads under the Clean Water Act section 402(p)(6), *id.*, presumably because forest roads will remain point sources unless this Court reverses the Ninth Circuit's decision invalidating EPA's regulation at 40 C.F.R. § 122.27. However, plaintiffs are certain to litigate EPA's interpretation relying on the Ninth Circuit's holding that section 402(p) of the Clean Water Act unequivocally creates a statutory obligation to treat stormwater runoff from logging roads as a discharge associated with industrial activity. Pet. App. 43a. Thus, EPA's approach does not eliminate the regulatory burden or the high likelihood of litigation gridlock.

B. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Struggling Forest Products Businesses that Rely on Federal Lands as a Source of Timber.

The extension of the Ninth Circuit's decision to federal forest land will adversely affect *amici's* members – whether responsibility to obtain the NPDES permits lies with the federal agencies or *amici's* members who have contracts, permits, leases, easements, and right-of-way agreements with these agencies. In either case, the sale and removal of timber from federal land and the use of grazing allotments will be

more costly and the approval process will be significantly delayed. Maintaining a steady supply of public timber at current market prices is crucial to help existing milling infrastructure survive which is also needed to help fight the forest health crisis on federal lands. Kramer, *Forest Service Says Lack of Sawmills Hurting Forests,* Wenatchee World (April 12, 2011), http://www.wenatcheeworld.com/news/2011/apr/02/forest-service-says-lack-of-sawmills-is-hurting/. Delaying public timber sales now for several years by requiring a costly NPDES permit process for the use of logging roads will threaten the already tenuous operations of sawmills, and of road and stewardship contractors that provide scarce jobs to support the struggling economies of rural communities. In order for the installed milling capacity and the skilled woods workers who support it to survive to better times, it is vital that the timber supply from public lands not be further curtailed by an NPDES permit process. If this infrastructure is lost by further constraining the supply of timber, it is unlikely that the investment will ever again be made in this industry and the loss of jobs will become permanent. This will devastate already struggling rural communities.

C. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Ranching Families and Businesses that Often Use the Same Roads Used for Logging on Federal Land.

Ranching families and businesses face similar concerns regarding the Ninth Circuit decision as they depend on "logging" roads to access their grazing leases on federal land. Since federal regulations discourage construction of duplicate roads, separate road systems have not been created for each specific purpose. *See, e.g.,* 43 C.F.R. § 2812.0-6(a)-(b) ("The intermingled character of the O. and C. lands presents peculiar problems of management which require for their solution the cooperation between the federal government and the owners of intermingled lands, particularly with respect to timber roads . . . the duplication of an existing road reduces the value of the federal and other timber which is tapped by the existing road."). Federal roads are used by loggers and ranchers alike. If the use and maintenance of a "logging" road on federal land without an NPDES permit violates the Clean Water Act, then invariably the Forest Service or BLM will preclude the use of the road for hauling logs, livestock, or other commercial products until an NPDES permit is issued. If the agencies choose not to preclude use of a "logging" road pending completion of an NPDES permit, then environmental groups undoubtedly will seek a judicial order to preclude the use of the road more broadly. *Amici* App. 9a.

D. The Imposition of a Time Consuming and Costly NPDES Permit Process on Federal Land Will Harm Intermingled Landowners who Require Access Across Federal Land.

Federal land is often intermingled with private land and the use of private land is dependent upon access across federal land. *See, e.g.,* E. RICHARDSON, BLM'S BILLION – DOLLAR CHECKERBOARD, MANAGING THE O & C LANDS (1980); Forest Roads: Construction and Financing, Cong. Res. Serv. Rep. 97-706 (1997), p.1 n.1. The Forest Service and BLM often have road use or right-of-way agreements with intermingled landowners that provide for sharing the cost of road construction and maintenance. *See* 42 U.S.C. § 1762 (Cost-Share Road Authorization). The BLM updated their Best Management Practices in 2011 and "as a result, current road construction and maintenance standards are substantially improved over the standards in existence when the CWA was enacted in 1972." 77 Fed. Reg. 30,473, 30,478 (May 23, 2012). *Amici* who have in holdings must access their forest or rangeland across roads on federal land. Lawsuits to compel federal agencies to obtain permits for federal roads will directly affect intermingled landowner access. Intermingled landowners face the prospect of being denied access to their private lands while waiting for federal land management agencies to complete the NPDES permit process.

CONCLUSION

Amici respectfully request that the Court reverse the Ninth Circuit's holding that NPDES permits are required for logging roads which extend through millions of acres of federal forest and rangelands and intermingled private lands. These lands supply timber and forage to support rural families and businesses that cannot afford to have federal resource management paralyzed by an unnecessary permit process and an interpretation of the Clean Water Act that will provide environmental groups new fertile ground for public lands litigation.

Respectfully submitted,

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August 2012

APPENDIX

IMPLICATIONS OF DECISION IN *NEDC V. BROWN* TO SILVICULTURAL ACTIVITIES ON NATIONAL FOREST SYSTEM LAND, U.S. FOREST SERVICE, SEPT. 7, 2010

Forest Service
Washington Office
1400 Independence Avenue, SW
Washington, DC 20250

File Code: 1570-1 Date: September 17, 2010

Route To:

Subject: Implications of Decision in Northwest Environmental Defense Center v. Brown to Silvicultural Activities on National Forest System Land

To: Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs and WO Directors

On August 17, 2010, the United States Court of Appeals for the Ninth Circuit (9th Circuit), in *Northwest Environmental Defense Center v. Brown* (*NEDC*), 07-35266 (9th Circuit), ruled that it considers storm water runoff from logging roads to be a discharge of pollutants from a point source when collected by ditches, canals, and culverts and discharged into streams. As such, the 9th Circuit ruled that these discharges are subject to permitting requirements of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES). Environmental Protection Agency (EPA) regulations at Title

40, Code of Federal Regulations, Section 122.27 (the "Silvicultural Rule,") exempted such discharges from the CWA's permitting requirements prior to this ruling. The Court held that the Silvicultural Rule violates CWA.

Although the Forest Service was not a party to *NEDC*, several questions have arisen about application of the decision to silvicultural activities on National Forest System land and its impacts on State, private, Tribal, and forest lands under other jurisdictions. The enclosed document, prepared by the Forest Service and the Office of General Counsel, addresses questions that field units have asked about *NEDC*.

Because the Forest Service was not a party, the Agency is not immediately impacted by the 9th Circuit decision in this case. At this time it is recommended that Forest Service personnel:

- Continue the use of best management practices, compliance monitoring, and update of National Best Management Practices Handbook and Monitoring Protocols.
- Work with EPA regional offices and States with delegated permitting authority to address permitting for logging road ditches and culverts.
- Continue to coordinate closely with EPA regarding best management practices.

If you have further questions regarding *NEDC* and its impact on the Forest Service, please contact your regional Office of General Counsel.

/s/Richard J. Cook (for) Tony Tooke
TONY TOOKE
Director for Ecosystem Management Coordination

cc: Anne Zimmermann
Richard Sowa
Tom Peterson

Q&As: 9th Circuit's August 17, 2010 decision in *Northwest Environmental Defense Center v. Brown*

Date: September 7, 2010

Issue: The 9th Circuit ruled that it considers storm water runoff from logging roads collected by ditches and culverts and discharged into streams to be a discharge of pollutants from a point source subject to permitting requirements of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES). Environmental Protection Agency (EPA) regulations at Title 40, Code of Federal Regulations (CFR), Section 122.27 (the "Silvicultural Rule,") exempted such discharges from the CWA's permitting requirements. The court held this exemption violates CWA.

Q: Was the Federal Government a Party to this litigation?

A: No. Neither EPA nor the Forest Service (FS) was a party in this lawsuit. This case involved environmental groups, private timber operators, and Oregon

state officials. The FS is not *immediately* bound by this ruling. However, it could have impacts on FS activities.

Q: Did the 9th Circuit issue a nationwide injunction?

A: No. The 9th Circuit did not issue a nationwide injunction of the regulations at 40 CFR §122.27, but remanded the case to the District Court for further proceedings. The 9th Circuit has not issued any injunction, final order, or mandate. It is unclear when the District Court of Oregon will act or how those further proceedings may impact the FS or private entities.

Q: How might this lawsuit impact FS operations?

A: The FS will likely need to obtain a permit for the discharge of storm water from logging roads, which is channeled through a system of culverts, pipelines, ditches, or other diversions. Although the decision in this particular lawsuit did not immediately bind the Agency, the FS has received its first notice of legal challenge to road construction and maintenance activities based on this decision and anticipates additional challenges within the 9th Circuit. States located within the jurisdiction of the 9th Circuit Court of Appeals include Arizona, California, Nevada, Oregon, Idaho, Washington, Montana, Alaska, and Hawaii.

Q: If the FS needs to obtain NPDES permits for its logging roads, how long will that take?

A: The FS is still evaluating the answer to this question. EPA has delegated NPDES permitting authority affecting National Forest System lands to the State governments of all but four States (ID, NM, Mass., and NH) and has retained it in most of the territories (including Puerto Rico). Each State has a different process and timeline in place for issuing permits. Some States may determine that a general permit for logging roads is appropriate, while others may determine that individual roads or timber projects require road-specific or project-specific permits. The FS will have to work closely with EPA and the States to efficiently obtain permits where necessary.

If the FS is required to obtain programmatic permits by State, we may have to work with 46 States and the process could take several years. If the FS is required to obtain permits on a road by road basis, that would mean obtaining up to 400,000 permits. This would likely take more than 10 years. There would also be an ongoing workload to maintain and administer these permits.

States located within the jurisdiction of the 9th Circuit Court of Appeals should be prioritized for any permitting activity.

Q: If the FS must obtain NPDES permits for its logging roads, how much will it cost?

A: The FS is still evaluating the answer to this question. See answer above.

Q: How will this ruling impact private timberlands?

A: Timber companies and others conducting silvicultural operations on private timber lands will likely be impacted in a manner similar to the FS, in that under this ruling, they must obtain a NPDES permit for storm water runoff associated with silvicultural activities and logging roads discharged to waters of the United States through a system of culverts, ditches, and canals. There are approximately 260 million acres of private woodlands across the United States. They are accessed by a road network that consists of Federal, State, county, and private roads. Interior roads accessing these acres are low-volume timber access roads similar to roads found within the Federal estate which access comparable forested lands. Similar challenges will exist with NPDES permitting on these lands when ditch and culvert templates are used for drainage and travel way stability. The FS currently has inventoried approximately 378,000 miles of roads under its jurisdiction of approximately 193 million acres. Although no comprehensive database of roads traversing private timber roads exists, it is reasonable to extrapolate that private owners will have a proportionate number of roads needed to access their timber. The specific

issue before the 9th Circuit involved private entities and the State of Oregon, and the Court's ruling may eventually affect all entities involved in resource management, whether private, State, or Federal.

Q: Must the FS stop building logging roads to wait for permits from the States or EPA?

A: No. The ruling does not immediately apply to the FS. The Circuit Court remanded the case to the District Court of Oregon for further proceedings. The District Court's future opinions may be instructive as to when and how the ruling might take effect. The FS, in the interim, should coordinate closely with EPA to determine the most efficient way to move forward.

Q: Does the 9th Circuit's ruling apply to new, existing, or reconstruction of logging roads?

A: The opinion does not distinguish between new, existing, or reconstruction of logging roads, but concluded that storm water runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which a NPDES permit is required. The lawsuit challenged private timber operators' failure to obtain a NPDES permit for existing logging roads.

Q: Have EPA or the States permitted discharge of storm water from logging roads before?

A: No. Prior to the Court's August 17, 2010, opinion, the Silvicultural Rule at 40 CFR §122.27 was in effect

and no permit was required. The Silvicultural Rule was an exemption to the CWA's permitting requirements, and was based upon Best Management Practices that EPA and the FS had agreed upon, and which the FS already had in place.

Q: How will this Ruling change storm water management activities on the ground?

A: This ruling should not affect road management practices. The FS currently uses best management practices (BMPs) and will continue to implement them to minimize sediment delivery to streams.

Q: Is there any chance that this decision could be overturned after further review by a higher-level court?

A: This is unknown, but unlikely at this time. This decision was decided by the 9th Circuit Court of Appeals. Additional review by either the 9th Circuit or the Supreme Court is very rarely granted, and the Federal Government has almost no ability to request further review of this decision because it was not a party to the litigation.

SIXTY DAY NOTICE OF INTENT TO SUE, AUG. 20, 2010

Law Office of Dana Johnson, PLLC

Dana M. Johnson, Attorney at Law

August 20, 2010

VIA CERTIFIED MAIL

Chief Tom Tidwell
USDA Forest Service
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Washington., DC 20250

Ranotta McNair, Forest Supervisor
Idaho Panhandle National Forest
3815 Schreiber Way
Coeur d'Alene, ID 83815

Secretary Tom Vilsack
U.S. Department of Agriculture
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Secretary Ken Salazar
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

RE: Sixty-day Notice of Intent to File Suit for Violations of the Clean Water Act

Dear Chief Tidwell, Supervisor McNair, Secretary Vilsack, and Secretary Salazar:

I am writing on behalf of Alliance for the Wild Rockies (AWR) and the Selkirk Conservation Alliance (SCA). AWR and SCA intend to file a citizen suit

pursuant to Section 505(a) of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. Section 1365(a). AWR and SCA hereby give notice, pursuant to Section 505(b) of the CWA, 33 U.S.C. Section 1365(b), that the USDA Forest Service has violated and continues to violate the conditions of the National Pollutant Discharge Elimination System (NPDES) as required by the CWA and its Implementing regulations.

On December 4, 2009, the Forest Supervisor of the Idaho Panhandle National Forests approved the implementation of the Lakeview-Reeder Roads Project, and on May 10, 2010, the Forest Supervisor of the Idaho Panhandle National Forests approved the implementation of the Lakeview-Reeder Fuels Reduction Project. AWR and SCA have reviewed public file documents available on the USDA Forest Service website for the Lakeview-Reeder HFRA Project and have identified reporting, monitoring, and compliance violations. If you have information that indicates the violations listed in this notice did not occur or are incorrectly stated, please immediately respond and specify to which violation that information applies. AWR and SCA intend to file suit at the end of the sixty (60) day notice period to enforce compliance against these violations as well as any additional violations that AWR and SCA may discover.

AWR and SCA are non-profit organizations dedicated to the protection of natural resources in the Northwest. AWR and SCA members regularly use and enjoy the waterways in Idaho, which are impaired by

the discharge of pollutants through stormwater runoff from logging roads. The Forest Service has an obligation under the CWA to regulate its stormwater discharges from these logging roads.

Violations of NPDES Permit Requirements for Point Source Discharge Stormwater Runoff from Logging Roads

Road work is proposed throughout the Lakeview-Reeder Project area, including road maintenance, road construction, and road storage and decommissioning. Major watersheds in the Project area are Granite Creek, Reeder Creek, and Kalispell Creek. Each of the streams in the project area is listed by the State of Idaho as impaired and not fully supporting beneficial uses. Kalispell Creek and Reeder Creek both have approved Total Maximum daily Loads (TMDL) for sediment. The Project would increase sediment delivery to these at-risk streams, thereby reducing water quality and impairing beneficial uses.

Stormwater runoff from logging roads deposits large amounts of sediment into streams and rivers. Much of this sediment is created by logging trucks hauling timber over roads and grinding up surface gravel and dirt. This sediment is then channeled away from road areas by ditches and culverts and eventually discharged into streams and rivers. The sediment adversely affects fish by disrupting eggs, decreasing oxygen levels, increasing stream temperature, and interfering with feeding.

This stormwater runoff, collection, and discharge is a point source discharge subject to the NPDES permit process under the CWA. Sections 301(a) and 402 of the CWA prohibit the discharge of any pollutant from a point source into navigable waters of the United States without a NPDES permit. The USDA Forest Service has violated the CWA and its implementing regulations by not obtaining permits for stormwater runoff that flows from logging roads into systems of culverts, ditches, and channels and then into forest streams and rivers.

Conclusion

If the above described violations are not cured, AWR and SCA intend to file suit under the CWA after the mandated sixty (60) day notice period to protect Idaho water resources and the interests of the AWR and CWA users who regularly use them, The intent of this action is to require the USDA Forest Service to come into full compliance with CWA requirements, particularly the NPDES permit process. In filing this action, AWR and CWA Intends to seek Injunctive relief as well as costs, attorneys' fees and litigation expenses as authorized by 33 U.S.C. Section 3.365(d).

If you wish to discuss any aspect of this notice or to discuss settlement of this matter prior to commencement of suit, please contact us.

Persons Giving Notice

The full names, addresses, and telephone numbers of the parties providing notice are:

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Sincerely,

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